

COPY

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF:
ROBERT J. WALLACE,

Grievant,

v.

DEPARTMENT OF CORRECTION,
Agency.

DOCKET NO. 06-06-0358

DECISION ON MOTION
TO DISMISS

BEFORE Brenda C. Phillips, Chairperson, John F. Schmutz, Paul R. Houck, Joseph D. Dillon, and Martha Austin, Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. § 5908(a).

APPEARANCES:

Robert J. Wallace, *pro se*

For the Agency:
Erika Y. Tross, Esquire
Deputy Attorney General
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

BACKGROUND

In April 2004, the Department of Correction posted a vacancy for the position of correctional lieutenant. In May 2004, the Grievant applied for this position. It was determined that he met the minimum qualifications for the position and was placed on the Department's register for this position. In April 2005, the Grievant was interviewed for the position. After the interview, the Grievant was listed as one of the top four candidates for the position. However, by letter dated April 26, 2005, the Grievant was notified that he had not been selected for the correctional lieutenant position. Approximately one year after this denial letter, the Grievant learned that another promotional candidate who had filed a timely grievance was successful in his grievance and was promoted. On March 13, 2006, the Grievant filed a grievance regarding the denial of the promotion. On April 6, 2006, the Grievant requested a Step 2 Hearing, claiming

that he had not received a response at the Step 1 level. By letter dated May 2, 2006, the Department issued a decision on the basis that the Grievant had not timely filed his grievance, which would not be considered at either the Step 1 or Step 2 level. The matter was filed with the Office of Management and Budget at a Step 3 hearing, which was held. Based on that hearing, a Step 3 decision was issued, dated June 2, 2006, in which the grievance was denied on the basis it had not been timely filed within 14 days from when the Grievant could have reasonably been expected to have knowledge of the grievable matter.

This grievance appeal was filed with the Merit Employee Relations Board ("Board") on June 8, 2006.

By Motion dated May 14, 2007, the Department sought to have the Board dismiss the appeal because the Board lacked jurisdiction to hear the appeal. The Department argued that because the grievance relates to a failure to promote under Chapter 10 of the Merit Rules, it must be grieved through the Merit system procedure outlined in Chapter 18 of the Merit Rules. *See* Merit Rule 1.3. The Department argued that Merit Rule 18.6 expressly requires that a written grievance must be filed within 14 calendar days of the date of the grievance. The Department argued that given the denial of his request by letter dated April 26, 2005, any grievance was due by May 10, 2005.

Mr. Wallace orally responded to the motion at a legal hearing, arguing that he was originally informed he was not chosen for promotion because his score was the last of 8 candidates, and therefore, he believed he had no grounds to grieve anything. He acknowledged he did not file his grievance until nearly one year later after his request for promotion had been denied. However, on March 13, 2006, he was informed by William Wharton that, in connection with another employee's grievance hearing, his name had been raised and he learned he was one of the top candidates for promotion. Mr. Wallace argued he had no knowledge that he was in one of the top candidate positions until discovered during the grievance hearing of the other employee. He explained Mr. Wharton informed him of a score sheet that showed him second as coming back from the State and fourth as going out from the Department of Correction. He learned then that he would have been one of the top 5 candidates for promotion. He argued that upon learning this information on March 13, 2006, he filed his grievance timely within Merit

Rule 18.6. Also, he argued the Step 3 decision was received on June 5, 2006, so his appeal to the Board on June 8, 2006, was timely filed under Merit Rule 18.9. He believed the union was aware the other employee had filed a grievance for his denied request for promotion. Mr. Wallace does not have a copy of the score sheet that showed him as second or third. After he filed his grievance, Deputy Warden Burris indicated he had been the No. 4 applicant. He believed being the fourth applicant would have given him the right of receiving the promotion; the first, second and third applicants were all promoted. Mr. Wallace indicated that soon after receiving the April 2005 letter, he spoke with Deputy Warden Burris who informed at that time that his score had been 8 out of 8 candidates.

The matter was presented to the Board by oral argument on May 17, 2007. This is the decision of the Board on the motion to dismiss the appeal.

DISCUSSION

A grievance or an appeal regarding a denial to promote is processed in accordance with Merit Rule No. 18.6.

An employee or grievant shall file, within 14 calendar days of the date of the grievance matter or the date he could reasonably be expected to have knowledge of the grievance matter, a written grievance which details the complaint and relief sought with his immediate supervisor. The following shall occur within 14 calendar days of receipt of the grievance. The parties shall meet and discuss the grievance and the step one supervisor shall issue a written reply. *See* Merit Rule No. 18.6.

In the present case and based upon representations of Mr. Wallace, the issue is whether his grievance filed on March 13, 2006 – approximately one year after receiving a letter denying his request for promotion – was timely filed under Merit Rule No. 18.6. This issue requires the Board to examine the arguments, as presented by the parties at the legal hearing, as to whether the 2006 grievance was within 14 days of the date of the grievance matter *or* within 14 days of the date an employee could reasonably be expected to have knowledge of the grievance matter.

The Board concludes that in the current situation and based upon the information

) presented by Mr. Wallace, Mr. Wallace reasonably had knowledge of the grievance matter on March 13, 2006. Mr. Wallace asserts the Deputy Warden, in 2005, verbally informed him that his score had been 8th out of 8 candidates requesting promotion. Mr. Wallace relied upon this statement, believed he did not have a basis for filing a grievance, and chose not to take any further action on his requested promotion. Mr. Wallace further asserts that approximately one year later, he learned of information inconsistent with the Deputy Warden's statement in that he was in the fourth position out of 8 candidates, which prompted the filing of his grievance.

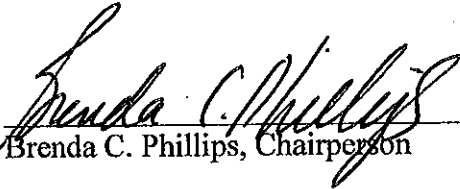
However, notwithstanding this conclusion, the Board further concludes that if facts presented at the evidentiary hearing differ from or present additional information concerning the representations at the legal hearing and the issue of knowledge, the Board reserves the right to consider such facts with respect to any further decision issued by the Board concerning this grievance.

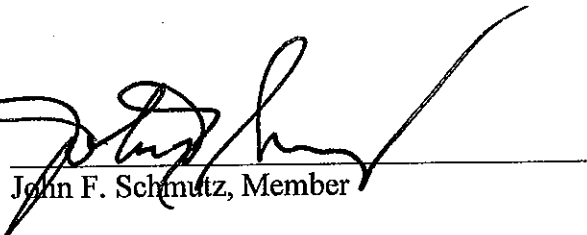
) Therefore, the appeal will not be dismissed and will be set for evidentiary hearing to afford Mr. Wallace, in his capacity as an applicant requesting promotion with the Department, the opportunity to present evidence as to the denial of the request for promotion.

ORDER

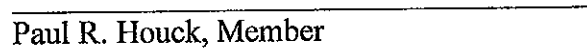
The Motion to dismiss the appeal of Mr. Wallace in the above-captioned matter, having been considered by the Board, for the reasons set forth above, is hereby DENIED.

BY ORDER OF THE BOARD:


Brenda C. Phillips, Chairperson


John F. Schmutz, Member


Joseph D. Dillon, Member


Paul R. Houck, Member


Martha Austin, Member

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: Aug 30, 2007

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Agency's Representative